Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 50554

In the Matter of	)	
	)	
Redevelopment of Spectrum to	)	ET Docket No. 92-9
Encourage Innovation in the	)	
Use of New Telecommunications	)	RM-7981
Technologies	)	RM-8004

To: The Commission

COMMENTS OF TIME WARNER TELECOMMUNICATIONS
ON THE THIRD NOTICE OF PROPOSED RULEMAKING

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January 13, 1993

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SUMMARY

Time Warner Telecommunications ("TWT") applauds the Commission's demonstrated commitment to act expeditiously in the allocation of spectrum for emerging technology services and the creation of a regulatory framework for those services. This forward momentum must not be allowed to stall. The First Report and Order and Third Notice of Proposed Rule Making in this proceeding presents the Commission with an opportunity to resolve critical timing issues that will determine whether the United States remains in the forefront of wireless telecommunications services.

The key to maintaining a world leadership position in wireless telecommunications is the availability of spectrum for emerging technology service providers. While allocation of spectrum to such services is a necessary first step, the United States will fall behind its European and Pacific Rim competitors unless emerging technology service providers are given access to that spectrum at the earliest possible date, consistent with the Commission's goal of ensuring that incumbent users of the spectrum are treated fairly. In addition, delays in making spectrum available for and licensing emerging technology services will cost the U.S. economy billions of dollars and deny to U.S. consumers the benefits of innovative telecommunications services. For these reasons, TWT believes that the transition period for the 2 GHz emerging technologies band should be no more than three

years. The comprehensive procedures adopted by the Commission to govern involuntary relocations after the transition period guarantee that incumbent users will suffer no harm in relocating to higher frequency bands or alternative media. Thus, there is no countervailing benefit to a lengthier transition plan.

TWT also believes that the commencement date of the transition period should not be tied solely to the effective date of the adoption of rechannelization plans in this docket. The comments submitted in that phase of this proceeding reflect a wide divergence of views. Indeed, the Commission has twice extended the filing deadlines in recognition of the complexity of the issues. Therefore, TWT urges the Commission to adopt a commencement date that is the earlier of the effective date of the rechannelization plans or the adoption of a PCS licensing scheme in General Docket 90-314.

TWT agrees with the Commission that a negotiated rulemaking can be the preferred method for reaching a consensus among affected parties on the criteria that will be used to define "comparable alternative facilities." The interests of the parties, combined with the active participation of the Commission, can ensure that the process is handled expeditiously and that the definition is reasonable and workable. However, since no criterion can be completely unambiguous, the Commission also should establish streamlined mediation procedures for the prompt resolution of those disputes that cannot be resolved through private negotiations.

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To: The Commission

COMMENTS OF TIME WARNER TELECOMMUNICATIONS ON THE THIRD NOTICE OF PROPOSED RULEMAKING

Time Warner Telecommunications ("TWT"),[1] by its attorneys, hereby submits its comments in response to the First Report and Order and Third Notice of Proposed Rule Making in ET Docket No. 92-9, released October 16, 1992, 7 FCC Rcd 6886 (1992) ("Third Notice"). By its actions in this docket and in General Docket 90-314,[2] the Federal Communications Commission ("FCC" or

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[1] TWT is a division of Time Warner Entertainment Company, L.P., a Delaware limited partnership ultimately controlled by Time Warner Inc. ("Time Warner"). Time Warner is a world leader in the fields of media, information, and entertainment, notably magazine publishing, motion pictures, television series production, records, books, and cable television. TWT participates with its affiliate, American Television and Communications d/b/a/ Time Warner Cable Group ("ATC"), in conducting personal communications services ("PCS") experiments pursuant to ATC's experimental licenses in New York, New York, Columbus, Ohio, Cincinnati, Ohio, and St. Petersburg, Florida. TWT also has conducted PCS experiments and demonstrations in Washington, D.C. pursuant to special temporary authority.

[2] See, e.g., Redevelopment of Spectrum to Encourage Innovation in the Use of New Technologies, Notice of Proposed Rule Making, 7 FCC Rcd 1542 (1992); Redevelopment of Spectrum to Encourage Innovation in the Use of New Technologies, Further Notice of Proposed Rule Making, 7 FCC Rcd 6100 (1992); Amendment of the Commission's Rules to Establish New Personal Communications Services, Notice of Proposed Rule Making and Tentative Decision, 7 FCC Rcd 5676 (1992) ("PCS NPRM").

"Commission") has demonstrated its unwavering commitment to facilitate the rapid introduction in the United States of new telecommunications technologies and services. In so doing, the Commission has recognized that delays in introducing new services, such as the delays experienced in the licensing of cellular telephone systems, jeopardize America's world leadership position in telecommunications and cost our economy billions of dollars.[3] To avoid these disastrous consequences and despite vigorous and well-organized opposition from many quarters, the Commission has moved forward courageously and expeditiously to reallocate spectrum for emerging technologies, while ensuring that incumbent users of the spectrum are treated fairly. This forward momentum must not be allowed to stall.

The Third Notice presents the Commission with the opportunity to complete its charting of a course for the rapid introduction of new telecommunications services for which pent-up demand currently exists, including the whole family of PCS services. In particular, the resolution of the critical timing issues identified in the Third Notice will determine whether the United States can claim a world leadership position in wireless communications. The comments offered herein by TWT are intended to assist the Commission in the proper resolution of these and other issues raised in the Third Notice.

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[3] See Third Notice, Separate Statement of Commission Andrew C. Barrett (delays in initiating cellular service "reported to have cost the economy $86 billion").

I. INTRODUCTION

A. Matters Resolved in the Third Notice

In the Third Notice, the Commission adopted its earlier proposal to allocate the 1850-1990, 2110-2150, and 2160-2200 MHz bands for the development and implementation of emerging technologies.[4] The Commission also adopted certain features of a transition plan for the reaccommodation of the fixed microwave licensees who presently use that spectrum. Specifically, beginning with the effective date of the Third Notice (i.e., January 27, 1993), proponents of emerging technologies services may negotiate voluntary relocation agreements with existing fixed microwave users. After an initial transition period, all existing fixed microwave licensees will retain co-primary status unless and until the spectrum requirements of an emerging technology provider conflict with an incumbent's operation. In such cases, the emerging technology provider may request involuntary relocation of the incumbent, as long as the emerging technology provider guarantees payment of all relocation expenses, builds the new microwave or alternative media facilities at the relocation frequencies, and demonstrates that the new facilities are comparable to the old. See Third Notice at ¶ 24.

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[4] The Commission has proposed to allocate a minimum of 90 MHz of spectrum between 1850-1895 and 1930-1975 MHz for licensed PCS services and has proposed to designate spectrum between 1910 and 1930 MHz for unlicensed PCS use. See PCS NPRM at ¶¶ 37, 43.

B. Issues Remaining for Resolution in the Third Notice

With these basic parameters in place, the Commission seeks further comment in the Third Notice on several remaining issues, including (1) the definition of comparable alternative facilities and the use of negotiated rulemaking procedures to arrive at such a definition; (2) the methods to be employed to resolve disputes over involuntary relocation and comparability of alternative facilities; (3) the use of tax certificates in connection with the transition plan; and (4) the length of the transition period. TWT's comments are confined to issues surrounding the transition period and the procedures for adopting a definition of "comparable alternative facilities" and resolving disputes arising over that definition.

II. THE TRANSITION PERIOD SHOULD BE LIMITED TO THREE YEARS

The Commission has proposed a transition period of between three and ten years, after which emerging technology service providers could require incumbent fixed microwave licensees to relocate involuntarily to higher frequencies (or alternative media), provided that the emerging technology service providers guarantee the costs of relocation, construct the new facilities at the relocation frequencies, and demonstrate that the new facilities are comparable to the former 2 GHz facilities. Third Notice at ¶ 24, 27. The Commission has announced that the transition period should commence with the adoption of the

rechannelization plans proposed in its Further Notice of Proposed Rule Making in this proceeding. Id. at ¶ 24.

TWT believes that the transition period should be no more than three years. A longer transition period will reduce incumbents' incentive to negotiate with emerging technology service providers, thereby frustrating the pent-up demand for new wireless telecommunications services, jeopardizing the United States' world leadership position in wireless telecommunications, and costing the U.S. economy billions of dollars. Moreover, given the full protection afforded to incumbent users of the emerging technologies band by the Commission's actions in the Third Notice, there is no countervailing benefit to extending the transition period. Indeed, in view of these protections, an even shorter transition period could accomplish the Commission's goals while accommodating the interests of the parties.

A. An Excessively Long Transition Period Will Frustrate Pent-Up Demand for New Services, Jeopardize America's World Leadership Position, and Cost the U.S. Economy Billions of Dollars

1. There is Considerable Pent-Up Demand for Emerging Technologies Spectrum and Services

The Commission recognized in the Third Notice that as the development of new electronic devices and applications has increased, the number of requests for spectrum to accommodate new services made feasible by these developments has increased. Third Notice at ¶¶ 1, 14. In the case of PCS, the Commission has granted over 150 experimental authorizations and received 96 requests for pioneer's preferences in PCS licensing. Id. at n.1.

Indeed, even fixed microwave users who may be required to relocate to higher frequencies have acknowledged that the many recent demands for spectrum for new services demonstrate a pressing need to reallocate spectrum. Id. at ¶ 10. Finally, a number of commenters contend that the 220 MHz of spectrum that the Commission proposes to reallocate for emerging technologies is already insufficient to meet the demands of the emerging technologies that have been identified. Id. at ¶ 11.[5]

2. Delays in Making Spectrum Available for and Licensing Emerging Technology Services Will Jeopardize the United States' World Leadership Position in Wireless Telecommunications

There is a general consensus among the commenting parties in this docket that the Commission must act expeditiously to make spectrum available for emerging technologies if the United States is to remain a competitive leader in the international telecommunications market. Third Notice at ¶ 9. Regulatory bodies in Europe and Japan are engaged in aggressive spectrum clearing and allocation activity. For example, a European Community directive committed member states to clear the frequencies needed for the Digital European Cordless

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[5] For example, Motorola Inc. has argued that the successful implementation of PCS services ultimately will require large blocks of clear spectrum. See Comments of Motorola Inc. in ET Docket 92-9 at 8-9 (Dec. 11, 1992). John Major, Motorola's Senior Vice President and General Manager, Worldwide Systems Group, Land Mobile Products Sector, testified at the FCC's en banc PCS hearing in December 1991 that the variety of PCS systems likely to be implemented (including private, private-shared, and public systems) will require more than 300 MHz of clear spectrum. See Statement of John E. Major, En Banc Hearing in Docket 90-314 (December 5, 1991).

Telecommunications System ("DECT"), which has been allocated the 1880 to 1990 MHz spectrum throughout the European Community, by January 1, 1992. See Council Directive 91/287/EEC (June 3, 1991). The detailed Annex accompanying the Council Recommendation on the Coordinated Introduction of Digital European Cordless Telecommunications Into the Community, which also was adopted on June 3, 1991, specified that "[f]acilities for applications based on DECT technology should progressively be available from the end of 1992." See Council Recommendation 91/288/EEC (June 3, 1991).

The European Radiocommunications Committee is proposing to draft a common frequency plan to cover the spectrum between 1350 MHz and 2690 MHz.[6] The purpose of the plan is to promote commonality among European countries in the use of these frequencies and to avert interference between the two principal mobile services that are expected to use frequencies within this band: DECT and European personal communications networks based on the DCS-1800 standard.[7]

In its recent survey of mobile communications, the Financial Times has observed that "when it comes to personal communications, the US is bursting with ideas. . . . But a complicated regulatory process and a wrangle over radio spectrum threaten to delay the introduction of commercial PCS." Financial

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[6] See Mobile Communications, "ERC Proposes Common European Frequency Plan" (Nov. 8, 1992).

[7] Id.

Times, Mobile Communications Survey, Sec. III at p. 7 (Sept. 8, 1992). The survey further noted that Millicom applied for a license to operate a wireless local telecommunications network in the United Kingdom in December 1991 and was informed in August 1992 -- less than nine months later -- that its license would be granted. Id. In contrast, the FCC is still in the process of developing its licensing schemes for PCS and other emerging technologies.

The Commission's first steps in reallocating spectrum for emerging technologies and proposing to allocate a portion of that spectrum for PCS should alleviate some of the concerns about delays. Unless these steps are followed by the adoption of procedures that will make the spectrum available on an expedited basis to providers of emerging technology services, however, the Commission's forward progress to date will do little to keep the U.S. in the forefront of wireless telecommunications technology and services. Commissioner Barrett, acknowledging this reality, has stated that "if we do not act to resolve [these] issues in a methodical, forthright, and assertive manner, then it is likely that international competition in other markets will establish de facto standards for us."[8]

3. Delays in Making Spectrum Available for and Licensing PCS Systems Will Cost the U.S. Billions of Dollars

According to a study prepared by National Economic Research Associates, Inc. ("NERA"), delays in licensing cellular

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[8] PCS News, Vol. 3, No. 19 (Sept. 17, 1992).

systems in the United States after they became technically feasible in the 1970s cost the U.S. economy approximately $86 billion.[9] This figure is considered conservative because it does not take into account the effect of the delay on the competitiveness of U.S. manufacturers, which would increase the cost to approximately $120 billion.[10]

According to Telocator's "PCS Demand Forecast," an expedient PCS licensing process in which PCS licenses were granted by 1994 (the Commission's most optimistic estimate) could result in 23 million subscribers within three years and 56 million subscribers by 2002, while a delay in licensing PCS until 1997 would result in approximately 10 million fewer subscribers by the year 2002.[11] Translated into dollars, analysts estimate that delays in licensing PCS systems in the United States currently impose costs on the U.S. economy of between $1 billion and $10 billion per year.[12]

Clearly, the costs of delay in making spectrum available and adopting licensing plans for PCS are unacceptably

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[9] J. Rohlfs, C. Jackson, and T. Kelly, "Estimate of the Loss to the United States Caused by the FCC's Delay in Licensing Cellular Telecommunications" at 23-24 (Nov. 8, 1992 (revised)).

[10] Financial Times, Mobile Communications Survey, Sec. III at p. 7 (Sept. 8, 1992) (quoting Charles Jackson, Vice President, NERA, one of the authors of the NERA study).

[11] See "PCS Demand Forecast," Telocator PCS Section, Marketing and Consumer Affairs Committee, Customer Requirements Subcommittee (May 1, 1992).

[12] Financial Times, Mobile Communications Survey, Sec. III at p. 7 (Sept. 8, 1992).

high. Demand for such services will go unmet in the U.S. while our global competitors introduce PCS in various parts of the world. Thus, Canada, which has cleared spectrum in the 944-948 MHz band for all components of digital cordless telephone service, selected four service providers in late 1992, who expect to commence service to the public in early 1993.[13] PCS service will be initiated in Europe and the Far East while this rule making is pending. America's leadership role in developing and implementing innovative telecommunications technologies and services will be jeopardized, and the U.S. economy will lose billions of dollars. To forestall these consequences of delay, the Commission should adopt the shortest possible transition period consistent with its other goals and in any event should adopt a transition period of no longer than three years.

B. The Protections to Be Afforded to Incumbents in the Third Notice Ensure That a Shorter Transition Period Will Not Harm Their Operations

Certain features of the transition plan were adopted by the Commission in the Third Notice and will become effective on January 27, 1993. Included among these features are the requirements imposed on emerging technology service providers who request incumbent fixed microwave licensees to relocate involuntarily to higher frequencies or alternative media after the transition period has ended. Specifically, the emerging technology service provider must (1) guarantee payment of all

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[13] Based on a telephone conversation with the Canadian Department of Communications (Jan. 12, 1993); see also PCS NPRM at ¶ 138.

relocation costs, including all engineering, equipment, site, FCC, and other reasonable additional costs; (2) complete all activities necessary for implementing the new facilities, including engineering, frequency coordination, and cost analysis of the complete relocation procedure; and (3) build the new microwave or alternative media system and test it for comparability to the existing 2 GHz system. The incumbent would not be required to relocate until the comparable facilities are available to it for a sufficient period of time in which to make adjustments and to ensure a seamless handoff. Third Notice at ¶ 24.

These detailed requirements, when coupled with co-primary status at the end of the transition period until a relocation request is made, ensure that incumbent users will suffer no harm to their operations from relocation. Therefore, the substantial harm caused by delays in making spectrum available for emerging technologies cannot be justified by the putative countervailing benefit arising from a lengthy transition period.[14]

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[14] The Commission has expressed concern that an incumbent may be disadvantaged by a "sudden or unexpected request for involuntary negotiations" and has suggested that a minimum time period of one year in which to negotiate a relocation should be imposed if a license is awarded to a new service provider towards the end of the transition period. Third Notice at ¶ 28. The protections afforded incumbents in the case of involuntary relocations render unnecessary a minimum time period for voluntary negotiations after the grant of a license to an emerging technology service provider. These protections ensure that incumbents will be fully compensated for the costs of relocation and will not be required to undertake even an

(continued...)

Incumbent fixed microwave users also gain additional protection from the Commission's proposal in the Further Notice of Proposed Rule Making in this proceeding to protect "growth frequencies" at the higher relocation frequencies, as it has done quite successfully for Part 21 licensees. TWT advocated this approach for relocating microwave licensees in its "Supplement to Request for Pioneer's Preference and Quarterly PCS Experimental Reports," filed in General Docket 90-314 on May 4, 1992. This approach has received considerable support in the comments filed in response to the Further Notice of Proposed Rule Making and will promote a more orderly and equitable transition.[15]

C. A Lengthy Transition Period Would Remove Incentives to Enter Into Voluntary Negotiations

In addition to being superfluous in view of the foregoing protections to existing fixed microwave licensees, a lengthy transition period would undercut the Commission's fundamental purpose in creating a transition period in the first place -- to create incentives to negotiate voluntary relocation

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[14](...continued)
involuntary relocation until "comparable alternative facilities" are available. Therefore, the only result of creating a minimum time period for "voluntary" negotiations would be to encourage incumbents to seek windfall payments during that time period. Moreover, we think it is unlikely, in view of the FCC's public notice and other procedural requirements, that an incumbent would be unaware until the issuance of a license to a new service provider that its spectrum was desired.

[15] See, e.g., Comments of Comsearch at 17-19 (Dec. 11, 1992); Comments of National Spectrum Managers Association on the Further Notice of Proposed Rulemaking at 5 (Dec. 11, 1992); Comments of Western Telecommunications, Inc. at 5-6 (Dec. 11, 1992).

agreements during the transition period. If the Commission adopts a lengthy transition period, incumbents -- armed with the knowledge that they would be fully protected from harm even after the transition period had ended -- could refuse to negotiate with emerging technology service providers during the entire period, thereby delaying unacceptably the introduction of new services.

The point in time at which emerging technology service providers may begin to construct alternative facilities for fixed microwave users also may have a significant effect on how promptly spectrum will become available for new technology services. Consider, for example, a case in which a fixed microwave user refused to enter into voluntary negotiations throughout the transition period. Under such circumstances, it should be permissible for the emerging technology service provider to construct the alternative facilities during the transition period so that the involuntary negotiations and relocation could take place promptly after the transition period ended. If such construction is not permitted to take place, the fixed microwave licensee effectively could extend the transition period by refusing to negotiate and thereby defer the commencement of construction of the alternative facilities until after the transition period had ended. The Third Notice does not address this issue, but the time involved in constructing and testing alternative facilities effectively could extend the transition period by many months if the new service provider is

not permitted to begin construction until the transition period has ended.[16]

TWT believes the Commission should clarify that the new service provider has the option to begin construction of alternative facilities prior to the end of the transition period, even if the existing user has declined to enter into voluntary negotiations up to that point in time. This option will maximize the incentives of existing users to engage in negotiations and to participate actively in the construction of alternative facilities, while still adhering to the procedures mandated by the Commission to ensure that incumbents are treated fairly in the relocation process.

D. The Commencement Date of the Transition Period Should Not Be Tied Solely to the Adoption of Rechannelization Plans

The Commission has announced that the transition period should commence upon the adoption of rechannelization plans in this docket following completion of the ongoing notice-and-comment rule making proceeding in response to the Further Notice of Proposed Rule Making. Third Notice at ¶ 24. TWT believes that tying the commencement date to the adoption of rechannelization plans may delay unacceptably the start of the transition period and that the transition period should commence as early as practicable.

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[16] Cf. Comments of Motorola Inc. in Docket No. 92-9 (Dec. 11, 1992) (urging Commission to consider authorizing construction of alternative facilities upon filing of application, in view of 12-15 month time frame for such construction).

The comments filed in response to the Further Notice of Proposed Rule Making reveal wide divergence on the proposed rechannelization plans. Some parties have opposed certain aspects of the rechannelization plans because of the potential harm to their use of the spectrum.[17] Other parties have offered detailed alternative plans that must be considered and evaluated.[18] Others, such as Associated PCN Company, have argued that the possibility of sharing the 2 GHz spectrum with fixed microwave users renders the proposed rechannelization plans premature and possibly unnecessary.[19]

Resolving the diverse issues raised by the rechannelization plans may take quite some time.[20] In view of the full protection to be afforded to incumbents during any relocation (whether during or after the transition period), the commencement of the transition period need not and should not be deferred until these issues have been resolved. The incumbents are fully aware of the proposed reallocation of the 2 GHz spectrum and have participated actively in this proceeding.

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[17] See, e.g., Comments of GE American Communications, Inc. (Dec. 11, 1992); Comments of the Satellite Broadcasting and Communications Association (Dec. 11, 1992).

[18] See, e.g., AT&T Comments (Dec. 11, 1992).

[19] See Comments of Associated PCN Company and Associated Communications of Los Angeles at 2 (Dec. 11, 1992).

[20] Indeed, in recognition of the complex issues raised in this phase of ET Docket No. 92-9, the Commission has twice extended the deadline for filing reply comments. See Order Extending Time for Comments and Reply Comments (released Nov. 24, 1992); Order Extending Time for Reply Comments (released Jan. 7, 1993).

Moreover, the FCC has authorized providers of emerging technologies services to initiate negotiations with incumbents for voluntary relocation on the effective date of the Third Notice -- January 27, 1992. Indeed, the record in this proceeding reflects that some proponents of new services have already made overtures to existing users of the spectrum.[21] Under these circumstances, there is nothing to be gained by deferring the commencement date, but much momentum will be lost by such deferral.

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[21] See, e.g., Letter dated April 9, 1992, to Albert Grimes, President, American Personal Communications, from G.A. Dieter, Supervisor, Planning & Development Unit, Telecommunications Department, Baltimore Gas & Electric, attached as Appendix V to Seventh Progress Report of American Personal Communications (filed with FCC April 28, 1992) ("BG&E believes its 2 GHz fixed radio frequencies represent a marketable commodity that it is willing to sell or share in some mutually financially beneficial arrangement with a PCS developer and to do so in a foreshortened time from well ahead of the proposed 5-15 year period suggested by the FCC"); see also Comments of Baltimore Gas and Electric Company filed in ET Docket No. 92-9 (June 5, 1992) ("BG&E generally supports the FCC's spectrum reallocation initiative . . . [and] proposal to allow providers of new services . . . to negotiate financial arrangements with existing licensees"); Comments of the City of San Diego filed in ET Docket No. 92-9 (June 2, 1992) (reciting that the City had been contacted by LOCATE to start negotiations to relocate the City's 2 GHz microwave system to higher frequencies and was willing to enter into such negotiations); Sixth Quarterly Progress Report of Personal Communications Network Services of New York (LOCATE) (filed with FCC March 31, 1992) (summarizing plans to purchase and "retire" existing 2 GHz fixed system of a "major commercial bank" and ongoing negotiations with "a state agency" and "a large industrial company"); Eighth Quarterly Progress Report of Personal Communications Network Services of New York (LOCATE) (filed with FCC Oct. 7, 1992) ("all of the existing 2 GHz users in the metropolitan New York area have expressed interest in negotiating migration as long as its cost will be borne by LOCATE").

TWT understands, however, that for administrative convenience and certainty, it is necessary to identify a date on which the transition period will commence. To ensure that the transition period commences on the earliest possible date, the Commission should consider adopting a commencement date that is the earlier of (1) the adoption of rechannelization plans or (2) the decision on the licensing of PCS systems in the PCS NPRM in Docket 90-314.[22]

III. THE COMMISSION SHOULD USE NEGOTIATED RULEMAKING AND ALTERNATIVE DISPUTE RESOLUTION PROCEDURES TO ARRIVE AT A DEFINITION OF "COMPARABLE ALTERNATIVE FACILITIES" AND TO RESOLVE DISPUTES OVER THE APPLICATION OF THE DEFINITION

The Commission has proposed that an emerging technology service provider requesting involuntary relocation of an existing fixed user is responsible for, among other things, building new fixed communications facilities and demonstrating that these new facilities are "comparable" to those being vacated by the existing fixed user. Clearly, the establishment of the appropriate public policy balance between minimizing or eliminating disruption to the existing users and protecting emerging technology service providers from a requirement that they construct economically inefficient gold-plated facilities

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[22] If the Commission declines to adopt either of these alternatives, TWT urges the Commission to complete the rechannelization portion of this proceeding as quickly as possible so that the transition period may commence expeditiously.

(or being denied access to spectrum altogether) depends upon the definition of the term "comparable."

Developing a framework for evaluating whether alternative facilities are comparable could involve consideration of many detailed technical questions and parameters. Nevertheless, it would also seem that the positions of the parties involved could be represented easily by a relatively small number of participants. Both of these considerations, together with the fact that implementation of the Commission's policies depends heavily on the definition of the "comparable" standard, suggest that the use of a negotiated rule making, in which the agency itself remains the final arbiter, is to be favored.

A. The Definition of "Comparable Alternative Facilities" Appears to be a Suitable Candidate for Negotiated Rule Making

In determining whether a particular set of regulations is a suitable candidate for negotiated rule making, the Commission must consider whether:

(1) there is a need for the rules;

(2) there are a limited number of identifiable interests that will be significantly affected by the rule;

(3) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who (i) can adequately represent the identifiable interests and (ii) are willing to negotiate in good faith to reach a consensus on the propose rules;

(4) there is a reasonable likelihood that a committee will reach a consensus on the proposed rules within a fixed period of time;

(5) the negotiated rule making procedure will not unreasonably delay the notice of proposed rule making and the issuance of final rules;

(6) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and

(7) the agency will, to the maximum extent possible consistent with the legal obligations of the agency, use the consensus of the committee with respect to the proposed rules as the basis for the rules proposed by the agency for notice and comment.[23]

The Commission currently is employing negotiated rule making to develop technical and service rules for low earth orbital satellite systems.[24] Under this approach, the Commission hopes to develop better regulations that may be implemented in a less adversarial setting.[25] Negotiations are conducted through an Advisory Committee chartered under the Federal Advisory Committee Act. A Federal Officer has been designated to chair the negotiating sessions, to help the negotiation process run smoothly, and to help participants define and reach consensus, and a Commission staff member has been designated to represent the interests of the Commission on the Committee.[26] The goal of the Committee is to reach consensus on the language and issues involved in the new regulations. If

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[23] See Public Notice, "FCC Asks for Comments Regarding the Establishment of an Advisory Committee to Negotiate Proposed Regulations," CC Docket No. 92-76 (DA 92-443, released April 16, 1992).

[24] See id. (low earth orbital systems below 1 GHz).

[25] Id.

[26] Id.

consensus is reached by the Committee, it will be used as the basis of the Commission's proposed regulations. If consensus is not reached, majority and minority views will be taken into account by the Commission in promulgating rules.[27]

When measured against the criteria outlined above, the definition of "comparable alternative facilities" appears to be a suitable candidate for negotiated rule making. Based on its understanding of the experiences encountered to date with these new procedures, and assuming the Commission's representative on the Committee plays an active role in the process and assures that the various public policy concerns are given appropriate weight and that the process moves along quickly, TWT is optimistic that a negotiated rule making could facilitate the expeditious adoption of criteria for defining "comparable alternative facilities." Accordingly, the FCC should promptly initiate a negotiated rule making proceeding with the goal of having the parties themselves, with active and appropriate guidance from the agency, develop a set of criteria under which comparability will be assessed.

B. Streamlined Mediation Procedures Should be Adopted to Resolve Impasses in Private Negotiations

Once reasonably unambiguous criteria for assessing comparability have been established, most cases undoubtedly will be solved through private negotiations. However, since no criterion can be considered completely unambiguous, the FCC also

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[27] Id.